90-946

No.

Supreme Court, U.S.
FILED
DEC 3 1990
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1990

S & M INVESTMENT CO.,
a California general partnership,
Petitioner,

VS.

TAHOE REGIONAL PLANNING AGENCY,
a public entity, DOES I through XXX, inclusive,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the administrative interpretation of the Governing Board of the Tahoe Regional Planning Agency ("TRPA") that the term "legal action" contained in Article VI(p) of the Tahoe Regional Planning Compact ("the Compact") includes actions other than "litigation" is entitled to deference.

2. Whether repeated misrepresentations of TRPA policy by high-level TRPA employees that under no circumstances could a TRPA approval be extended and that SMIC's approval expired 10 months earlier than it did constitute affirmative misconduct sufficient to invoke equitable estoppel.

3. Whether the term "legal action" in Article VI(p) of the Compact means only "litigation," as found by the Court below, or means "lawful action" as SMIC contends and as TRPA now concedes by the adoption of Resolution 90-8.

4. Whether genuine issues of material fact exist precluding summary judgment.

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PETITION FOR WRIT OF CERTIORARI

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner S & M Investment Co., a California general partnership ("SMIC"), prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in the above-entitled case on August 15, 1990.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 911 F.2d 324 (9th Cir. 1990) and is printed in Appendix A hereto, infra, page A-1. The order of the United States District Court for the

Eastern District of California is printed in Appendix B hereto, infra, page A-11. The judgment of the District Court is printed in Appendix D hereto, infra, page A-18.

JURISDICTION

The decision of the Court of Appeals (Appendix A, infra, page A-1) was entered on August 15, 1990. A timely petition for rehearing was denied on September 14, 1990 (Appendix C, infra, page A-17. The jurisdiction of the Supreme Court is invoked under 28 USC § 1254(1).

STATUTE INVOLVED

This case involves Article VI(p) of the Tahoe Regional Planning Compact (Public Law 96-551-Dec. 19, 1980, 94 Stat. 3233, 3248) ("the Compact") which provides as follows:

> (p) Approval by the agency of any project expires 3 years after the date of final action by the agency or the effective date of the amendments of this compact, whichever is later, unless construction is begun within that time and diligently pursued thereafter, or the use or activity has commenced. In computing the 3-year period any period of time during which the project is the subject of a legal action which delays or renders impossible the diligent pursuit of that project shall not be counted. Any license, permit or certificate issued by the agency which has an expiration date shall be extended by that period of time during which the project is the subject of such legal action as provided in this subdivision.

STATEMENT OF THE CASE

This case concerns the life of a permit issued by TRPA to SMIC to build a car dealership on an abandoned quarry pit near the Lake Tahoe Airport, South Lake Tahoe, California. The jurisdiction of the District Court was based on 28 U.S.C. § 1331 and Article VI(j) of the Compact which provides that lawsuits involving the Compact may be filed in the appropriate court of the

United States. The jurisdiction of the Court of Appeals was based on 28 U.S.C. § 1291.

On October 1978, SMIC obtained an option to purchase a 4.1 acre parcel located on U. S. Highway 50 across from the Lake Tahoe Airport in South Lake Tahoe, California ("the property"). The property had been previously used as a rock quarry pit, for butane gas storage and as a motorcycle distributorship. SMIC exercised the option and purchased the property on September 7, 1979.

In early 1979, SMIC commenced the process of obtaining the necessary approvals to allow the City of South Lake Tahoe ("the City") to issue a building permit to construct a 12,500 square foot car dealership ("the project") on the property (SMIC Memo, Stack Aff. 1.3)[1]. Under current land use restrictions, development of the property is limited to the present 2,000 square foot structure. The difference in the fair market value between a 12,500 square foot structure and the existing 2,000 square foot structure is approximately $500,000. In 1979, all such projects were regulated by the City, the California Tahoe Regional Planning Agency ("CTRPA) and the Tahoe Regional Planning Agency ("TRPA"). A building permit would not be issued until an applicant had obtained City approval, followed by CTRPA approval, followed by TRPA approval.

On January 30, 1979, SMIC submitted to the City applications for a special use permit, zoning variance and architectural review. On March 7, 1979, the City approved the applications (SMIC Memo, Stack Aff. 1.3). The approval was valid for one year and could be extended for one additional year.

On March 31, 1979, SMIC submitted an application to CTRPA. (SMIC Memo, Stack Aff. 1.3). On April 30, 1979, SMIC submitted an application to TRPA. (SMIC Memo, Stack

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[1] SMIC's Memorandum of Points and Authorities in Opposition to Motion for Summary Judgment is cited as "SMIC Memo." TRPA's Memorandum of Points and Authorities in support of Motion for Summary Judgment is cited as "TRPA Memo." Affidavits to those Memoranda are cited as "Aff.," and Exhibits as "Exh."

Aff. 1.3). On February 1, 1980, CTRPA approved the application. (SMIC Memo, Stack Aff. 1.3). Like City approval, CTRPA approval was valid for one year and could be extended for one additional year. (TRPA Memo, Exh. A). On February 27, 1980, TRPA gave its approval. At that time, TRPA approval was valid for 18 months. (TRPA Memo, Exh. A:12).

In Lake Tahoe, the building season extends from May 15 to October 15. (TRPA Memo, Exh. A:5). A project may not commence construction if all grading, drainage, foundation, paving and landscaping cannot be completed by October 15th of that year. (TRPA Memo, Exh. A).

SMIC now had all of the necessary approvals required to draw a building permit. The next step was to prepare a complete set of plans which the City required prior to the issuance of an actual building permit. (SMIC Memo, Stack Aff. 2:4-7). Once the plans were approved and the building permit drawn, then contract bidding could proceed. Once bid documents had been received, construction and permanent financing could be pursued. Next would come grading, drainage, foundation, paving and landscaping. TRPA gave its approval on February 27, 1980, approximately ten weeks before the start of the 1980 building season. (TRPA Memo, Exh. A). Construction did not start in the 1980 building season because there was insufficient time to obtain a complete set of construction drawing, bids, financing and to finish the required construction before October 15, 1980. (SMIC Memo, Stack Aff. 4-8).

On March 7, 1980, the City extended its approval for one year. (SMIC Memo, Stack Aff. 5:13). On December 19, 1980, the Compact was enacted. Article VI(p) provided that all existing approvals would be valid for a period of three years from December 19, 1980.

On November 26, 1980, SMIC asked CTRPA for a one-year extension. (TRPA Memo, Exh. C). SMIC asked to be placed on the January 1981 agenda as the existing approval would expire February 1, 1980. (SMIC Memo, Stack Aff. 3:8-9). CTRPA acknowledged that the request for an extension had been timely received but placed SMIC on the February agenda. (TRPA

Memo, Exh. C). On February 6, 1981, CTRPA adopted Urgency Ordinance 81-11 which provided that CTRPA would not extend any existing permits until TRPA had implemented the provisions of the Compact. (TRPA Memo, Exh. B).

On March 5, 1981, the City issued a new approval which was valid for one year and could be extended for one additional year. (SMIC Memo, Stack Aff. 5:13). On August 7, 1981, CTRPA extended its approval for one year. Urgency Ordinance 81-11 had held up the project for six months and prevented it from going forward in the 1981 building season.

Following the August 7, 1981 CTRPA approval, SMIC prepared construction drawings and submitted them to the City for approval. After the construction drawings were approved, SMIC drew a building permit on December 31, 1981.

In the first half of 1982 interest rates reached 22%. Financing was unavailable for real estate development. The project was stopped dead in its tracks. For this reason, no construction occurred in the 1982 building season. (SMIC Memo, Stack Aff. 5:13).

In July 1982, Brian Stack, SMIC's managing partner, went to TRPA to inquire as to the status of the TRPA approval. A TRPA employee told Stack that SMIC's approval was valid until February 26, 1983. The TRPA employee stated that approvals were valid only for three years from the date of issue and that there were no extensions under any circumstances. (SMIC Memo, Stack Aff. 5:15). These statements represented TRPA policy. (TRPA Memo, Exh. I, October 16, 1984 letter). They were not the erroneous conclusions of a low-level employee as the Court before has deemed them. (TRPA Memo, Exh. I, October 16, 1984 letter). As discussed, infra, in his February 22, 1984 letter, TRPA's Project Review Chief confirmed the erroneous information given to Stack that the approval expired on February 27, 1983. (TRPA Memo, Exh. H).

These statements were false. SMIC's permit did not expire on February 26, 1983 but on December 19, 1983. (Compact, Article VI(p)). In addition, approvals could be extended if they were

subject to a legal action which delayed or rendered impossible the diligent pursuit of the project. (Compact, Article VI(p)).

Meanwhile, on July 30, 1982, CTRPA adopted Urgency Ordinance 82-20. (TRPA Memo, Exh. E). This ordinance was in direct response to the Regional Plan which TRPA was preparing. (TRPA Memo, Exh. E). The CTRPA ordinance continued Urgency Ordinance 81-11. (TRPA Memo, Exh. E). Because of CTRPA Ordinance 82-20 and the erroneous information given by TRPA to SMIC, the project did not go forward in the 1983 building season. (SMIC Memo, Stack Aff. 7:17).

Upon adoption of the Regional Plan, CTRPA was deactivated. This occurred in April 1984. Shortly, thereafter the California Attorney General's Office and the League to Save Lake Tahoe, in separate lawsuits, sued TRPA in federal court asserting that the new Regional Plan was insufficient to meet Compact mandates. Federal court issued an injunction which prohibited TRPA from honoring then-valid approvals such as the approval which SMIC held. (United States District Court, Eastern District of California, Nos. CIVS-84-0561-EJG and CIVS-84-0565-EJG).

SMIC continued to inquire concerning the status of its approval. In his February 24, 1984 letter, TRPA's Project Review Chief stated that the approval expired on February 27, 1983. (TRPA Memo, Exh. H). The statement contained in this letter like that of the TRPA employee was false. SMIC was unaware that the approval permit had only recently expired (December 19, 1983), that is, unless it had been extended by operation of Article VI(p). (SMIC Memo, Stack Aff. 5:15).

When Stack discovered that TRPA had grossly misinformed and misled him concerning the life of his permit, he requested an extension based upon Article VI(p) of the Compact. (SMIC Memo, Exh. I). This provision allows for an extension based upon "legal action" which "delays or renders impossible the diligent pursuit of a project." (Compact, Article VI(p)). In her October 16, 1984 letter, TRPA's counsel states "It has always been the position of TRPA counsel that the language of Article VI(p) does not allow for extensions of approvals." (TRPA Memo, Exh. I,

October 16, 1984 letter). But Article VI(p) does provide for extensions. (Compact, Article VI(p)).

For the next year, Stack appealed the TRPA staff's denial of the extension. During appeals to the Advisory Planning Commission and finally to the TRPA Board itself, TRPA's counsel continued to state that Article VI(p) did not allow for extensions. During this time, the TRPA Governing Board directed the drafting of an ordinance defining "legal action." The Board was unable to come to an agreement as to what the term encompassed. (SMIC Memo, Exh. 12:1-2).

In March 1986, after being subjected to months of continuing delays, Stack insisted that the TRPA Governing Board finally hear SMIC's appeal of the extension denial. (TRPA Memo, Exh. O). The Board first voted on a motion to deny the appeal. (TRPA Memo, Exh. P, 196:6-10). Under Article III(g)(2) of the Compact, nine votes are necessary to approve a project. The votes necessary to pass the motion were not obtained. (TRPA Memo, Exh. P, 198:7-25, 199:1-6). TRPA counsel advised the Board that if the motion to deny the appeal did not pass then under Article III(g)(2) the motion would be deemed rejected and the effect would be to approve the appeal thereby approving the extension. The Board then considered a motion to grant the appeal. Again the vote necessary to pass the motion was not obtained. However, now the effect was to deny the appeal thereby denying the extension. (TRPA Memo, Exh. P, 206:6-25, 207:1-9).

On May 27, 1986, SMIC filed a petition for writ of administrative mandamus, petition for writ of mandamus and complaint for declaratory relief in the California Superior Court for El Dorado County. TRPA petitioned for removal to the United States District for the Eastern District of California based on Article VI(j) of the Compact. SMIC did not contest federal jurisdiction. On August 25, 1987, a first amended complaint was filed adding causes of action for permanent or temporary taking (inverse condemnation).

In December 1987, TRPA had still not arrived at a satisfactory interpretation of "legal action." TRPA's counsel wrote to the

TRPA Legal Committee admitting that "in certain instances . . . there may be governmental action or tangential litigation, which, equitably, should toll the TRPA permit and should not be counted as part of the three year permit period." (SMIC Memo, Exh. 13).

On December 9, 1987, TRPA filed a motion for summary judgment on the counts 1 through 3 of the first amended complaint. The motion was heard on January 8, 1988. Almost a year later, on December 7, 1988, the District Court granted TRPA's motion for partial summary judgment. The parties stipulated to a voluntary dismissal of counts 4 and 5, and judgment was entered on February 13, 1989. Notice of appeal was filed on March 10, 1989.

On March 28, 1990, TRPA's Governing Board unanimously passed Resolution 90-8 (Appendix A-20). The purpose of the Resolution is to define "the procedure for dealing with the questions of what constitutes legal action." The Resolution was made necessary because a "determination needs to be made as to what constitutes such a 'legal action'." Implicit in Resolution 90-8 is the recognition that "legal action" means more than just "the filing of a court action for quiet title, breach of purchase and sale agreement, eminent domain proceeding, and any other court order affecting the project." All other questions involving "legal action" are to be referred to the TRPA's Legal Committee for recommendation and then to the Governing Board for final decision. The legal memorandum prepared for the Governing Board specifically focuses on instances where building moratoria and stop notices under certain circumstances would constitute "legal action" which would support an approval extension.

On April 4, 1990, SMIC filed an emergency motion under Circuit Rule 27-3 for an order augmenting the record on appeal to include Resolution 90-8.

On August 15, 1990, the Court of Appeals affirmed the District Court's order and denied the motion to augment. On September 14, 1990, the Court of Appeals denied SMIC's petition for rehearing.

REASONS FOR GRANTING WRIT

Although the questions presented for review appear as four somewhat separate and distinct legal issues, these issues should also be viewed against TRPA's actions taken as a whole. As set forth previously, the road which SMIC has traveled to obtain project approval has not been not an easy one. The requirements of three separate governmental entities have had to have been satisfied. The project faced two CTRPA moratoria and an injunction directed against TRPA. Just at the point where SMIC could go forward in the 1983 building season, a TRPA employee torpedoed such effort by reciting TRPA's policy that approvals expired three years after the date of issue and that no extensions were available under any circumstances. If it were not for these misstatements, construction would have started on May 15, 1983.

It should be kept in mind that while TRPA staff and counsel may have concluded that "legal action" meant only "litigation," such conclusion was not shared by TRPA's Governing Board. The Governing Board was divided as to what the words meant. The deadlocked vote of the Board on the motions to grant and to deny the appeal underscores this division. SMIC's motion to grant the appeal was decided adversely only because of a quirk in TRPA's procedural rules. It was not denied because the Board concluded that "legal action" meant only "litigation."

With the adoption of Resolution 90-8 on March 28, 1990 the Board has finally reached a consensus as to the meaning of "legal action." The Resolution recognizes that "legal action" is not limited only to "litigation." "Legal action" also includes other actions such as moratoria or stop notices.

Some appreciation for the intensity with which TRPA staff and counsel have fought this project may be seen by the fact that at the very time when TRPA's Governing Board had adopted Resolution 90-8 giving "legal action" a broad interpretation, TRPA's counsel was arguing to the Court of Appeals that the District Court's restrictive interpretation should be followed. From the history of this project, it is clear that SMIC has not been dealt with fairly and as a consequence has been deprived of valuable rights.

TRPA's Governing Board's Interpretation That "Legal Action" Includes Actions Other Than "Litigation" is Entitled to Deference

Implementation of land use statutes is rarely a matter of "black and white." To achieve the socially desirable objectives of such statutes, the agencies charged with their implementation must have a certain measure of flexibility and discretion.

When the motion for summary judgment was argued to the District Court on January 8, 1988, TRPA had not administratively interpreted the meaning of "legal action." From the record it is clear that TRPA had struggled for years with what constitutes "legal action." (SMIC Memo, Exh. 12 and 13).

On March 28, 1990, TRPA's Governing Board unanimously adopted Resolution 90-8 (Appendix A-20). This Resolution was adopted because a "determination needs to be made of what constitutes such 'legal action'." The Resolution authorized TRPA's Executive Director to make extension approval determinations where a "court action" had been filed and that "any other application for extension pursuant to Article VI(p) of the Compact where the definition of legal action is at issue" would be submitted to the Legal Committee for recommendation and to the Governing Board for final determination.

From Legal Committee memoranda and from discussions leading to the adoption of Resolution 90-8, it is evident that TRPA Board members recognized the need for flexibility and discretion in dealing with approval extensions for project delay resulting from events beyond the control of the permittee such as building moratoria and stop notices.

If the Court applies the doctrine of deference to TRPA's administrative interpretation, then two additional desirable benefits would be realized. First, permittees would not be encouraged to break the law, e.g., ignoring a stop work order, thereby requiring TRPA to file a court action to obtain an injunction which would result in an automatic approval extension. Second, permittees would not be encouraged to initiate sham litigation to obtain approval extensions.

The District Court recognized the principle of judicial deference to administrative interpretation. Unfortunately, at the time that the summary judgment was decided Resolution 90-8 had yet to be adopted. There seems little question that if Resolution 90-8 had been before the District Court along with copies of the memoranda prepared by TRPA counsel explaining the need for Resolution 90-8, the motion for summary judgment would have been denied.

The interpretation of a statute by an agency charged with its administration is entitled to deference from the courts. *Thomas v. Peterson,* 753 F.2d 574, 562 (9th Cir. 1985); *Alcaraz v. Block,* 746 F.2d 593, 606 (9th Cir. 1984). Absent compelling evidence that an agency's interpretation is wrong, that interpretation should be upheld. *People of the State of California, ex rel. Younger v. Terpa,* 516 F.2d 215, 219 (9th Cir. 1975).

Because TRPA's Governing Board's interpretation of "legal action" is a reasonable one and because it is consistent with the Compact's overall purpose, it is entitled to deference. See, *Sederquist v. TRPA,* 652 F.Supp. 341, 345 (D. Nev. 1987). Although Resolution 90-8 was before the Court of Appeals in the form an emergency motion to augment the record, the Court's opinion makes no reference to the Resolution. It appears that the Court chose to impose its own interpretation of "legal action" rather than recognizing the interpretation of the agency charged with the Compact's implementation. The effect of the Court's opinion is to invalidate Resolution 90-8 and to deny TRPA any flexibility or discretion in dealing with issues related to approval extensions. In ignoring the well established principle of deference to administrative interpretation the Court of Appeals has decided a question in a manner that conflicts with existing decisions.

The Misinformation Given by TRPA Regarding the Expiration Date of the Approval and the Lack of Approval Extensions is Sufficient to Establish Equitable Estoppel

SMIC believes that the court below correctly sets forth the elements of traditional estoppel and the additional requirements

of affirmative misconduct and serious injustice without undue public harm if estoppel is to be imposed against a governmental entity. Where SMIC disagrees with the court below is in its characterization of the conduct in question. The court below finds that "the conduct at issue involves one oral misstatement by a low level government employee. . . . Thus, a single oral misstatement by a government employee will not ordinarily constitute affirmative misconduct." (Opinion at 329).

Stack was told in July 1982 that his permit would expire three years from the date of approval (February 27, 1983). He specifically asked whether there was any way he could obtain an extension. He was told that there were absolutely no provision for extensions of TRPA approvals under any circumstances. As a result, Stack believed that SMIC could not build in the 1983 building season. Based upon the facts as presented herein, traditional elements of estoppel have been met. The remaining question is whether the District Court could say, as a matter of law, that the conduct of TRPA'S employee could not have been found by the trier of fact to constitute affirmative misconduct.

The court below found that because the statements of TRPA's Project Review Chief, TRPA's counsel, and a TRPA Board member were made after December 19, 1983 they "cannot be used to estop TRPA from enforcing the regular December 1983 expiration date." (Opinion at 329, Footnote 5). The significance of these statements is that they establish that the statements made to Stack were not those of a "low level government employee" who had misinterpreted a statute, but rather represented recitals of long-standing TRPA policy recognized at all levels from the clerk at the desk through the Project Review Chief to the Governing Board. Taken as a whole, SMIC contends that TRPA's conduct from the lowest level to the highest constitutes "affirmative misconduct going beyond mere negligence."

As Used in Article VI(p) "Legal Action" Should Not Be Narrowly Construed to Include Only "Litigation," But Should Be Construed to Include Include "Lawful Acts" in Addition to "Litigation"

The District Court concluded that SMIC's suggested construction of "legal action" "borders on the frivolous." (Order, 4:6). The District Court bolsters its conclusion that "legal action" meant only "litigation" by finding that TRPA had administratively construed the language of Article VI(p). The basis for so finding was the Board's denial of the requested approval extension. As previously discussed, the Board never determined that "legal action" meant only "litigation." Rather, that by a quirk of TRPA's procedural rules, if nine of the members of the Governing Board do not vote in favor of a motion, then the motion is deemed denied. Because the required number of the Governing Board did not vote to grant SMIC'S appeal, the effect was to deny the appeal.

With the adoption of Resolution 90-8, the District Court by virtue of its own application of existing law would be required to find that "legal action" included "lawful action" as well as "litigation."

To support its construction that "legal action" means "litigation," the court below first deems "legal action" to be a term rather than to be two words. Referring to *Black's Law Dictionary*, (5th ed. 1979), the court below was unable to find the term "legal action." It did find the word "action" which is defined in its legal sense to mean "a suit brought in a court." Next, the court below looked to the word "litigation." The definition of "litigation" refers to "legal action." Thus, the court below reasoned that because "litigation" means "legal action" the reverse was also true. SMIC challenges this reasoning. While it is undoubtedly true that in every instance "litigation" is a "legal action," it is not true that every "legal action" is a "litigation."

Webster's New Universal Unabridged Dictionary, 2nd ed. (1979) defines "action," inter alia, as "3. Act or something done; a deed. . . . 7. In law, a lawsuit or legal process; a claim made before a court. Actions are civil, criminal or penal. . . ." "Legal" is

defined as "1. of, based upon, authorized by law. 2. . . . a legal act. . . ." The definition of "legal" in *Black's Law Dictionary* is similar to the *Webster's Dictionary:* "1. Conforming to the law; according to law, required or permitted by law . . . see **lawful, valid.**"

It appears that the court below engaged in "dictionary shopping" to find definitions which served its purpose. SMIC suggests that the word "legal" and "action" when used together are not limited to a proceeding in a court of law also include any lawful act or deed. Under this construction, CTRPA and TRPA moratoria constitute "legal action" which "delays or renders impossible the diligent pursuit of a project."

Genuine Issues of Material Fact Exist Which Preclude Summary Judgment

Genuine issues of material fact are present which preclude the granting of summary judgment. These include the following: (1) Has TRPA's Governing Board administratively interpreted Article VI(p)? (2) Were the misstatements of approval duration and lack of approval extension misstatements of a low level governmental employee or did they pervade all agency levels? (3) Was SMIC's car dealership project singled out by some TRPA employees as undesirable and subjected to unfair treatment?

SMIC believes that the trier of fact would find (1) that TRPA's Governing Board has interpreted "legal action" to include the lawful acts which SMIC has all along contended that the words encompassed, and (2) that the conduct of TRPA employees at all levels constituted not just mere negligence but affirmative misconduct sufficienit to invoke principles of equitable estoppel.

CONCLUSION

For the foregoing reasons this petition for a writ of certiorari should be granted.

Respectfully submitted,

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December 6, 1990

APPENDIX A

OPINION OF THE COURT OF APPEALS

S & M Investment Co.,
a California California general partnership,
Plaintiff-Appellant,
v.
Tahoe Regional Planning Agency,
a public entity, Does I through XXX, inclusive,
Defendant-Appellee.
No. 89-15353.

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted April 19, 1990.
Decided Aug. 15, 1990.

John S. Warnlof, Ruta Paskevicius, Nelson, Warnlof & Vencill, San Ramon, Cal., and Gregg R. Lien, Hoffman, Lien, Faccinto & Spitzer, Tahoe City, Cal., for plaintiff-appellant.

Susan E. Scholley, Tahoe Regional Planning Agency, Zephyr Cove, Nev., for defendant-appellee.

Appeal from the United States District Court for the Eastern District of California.

Before LIVELY,* FLETCHER, and REINHARDT, Circuit Judges.

REINHARDT, Circuit Judge:

Appellant, S & M Investment Company ("S & M"), contests the expiration of a development permit granted to it by the appellee, the Tahoe Regional Planning Agency ("TRPA"). S & M contends, first, that the period in which it had to commence construction under the permit was tolled because the project authorized by the permit was the subject of "legal action."

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* The Honorable Pierce Lively, Senior Circuit Judge of the Sixth Circuit, sitting by designation.

Second, appellant asserts that TRPA should be estopped from contending that S & M's permit had expired because a TRPA staff member provided S & M with erroneous information concerning the expiration of the permit and the possibility of obtaining an extension. The district court, 702 F.Supp. 1471, granted TRPA's motion for summary judgment, and S & M appealed. We affirm.

I. FACTS

In 1968, California and Nevada, with congressional approval, entered into an interstate agreement to provide for the conservation of resources and control of development in the Lake Tahoe Basin. The agreement, known as the Tahoe Regional Planning Compact, created the Tahoe Regional Planning Agency and authorized the agency to develop a regional development plan. Pub.L. 91-148, 83 Stat. 860 (1969). In 1973, California created the California Tahoe Regional Planning Agency ("CTRPA") to establish and enforce stricter development controls on the California side of the Tahoe Basin. Developers building on the California side of the basin were required to obtain permits from both agencies.

On February 1, 1980, S & M received a one-year permit from CTRPA for the construction of a car dealership. Later that month, on February 27th, the company obtained an eighteen-month TRPA permit. In 1980, California and Nevada amended their interstate agreement to require TRPA to take a number of specific actions in order to protect the region's environment. Pub.L. No. 96-551, 94 Stat. 3233 (1980) (the "1980 Company"). California also agreed to deactivate CTRPA as soon as TRPA adopted a new regional plan. Cal.Gov't Code § 67131. Under the amended agreement, S & M's TRPA permit was automatically extended until December 19, 1983 (three years from the date Congress approved the 1980 Compact).[1] S & M

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[1] Article VI(p) of the 1980 Compact states:

> Approval by the agency of any project expires 3 years after the date of final action by the agency or the effective date of the amendments to this compact, whichever is late[sic], unless construction is

applied for an extension of its CTRPA permit, but because CTRPA delayed and temporarily suspended action on permit extensions pending adoption of new procedures, S & M was unable to obtain one until August 7, 1981. This one-year extension was due to expire on August 7, 1982. Since the extended permit was not granted until close to the end of the 1981 building season, S & M did not begin building that year. During the 1982 season, S & M also failed to commence construction, this time apparently due to a sharp increase in building costs. Instead, in 1982 S & M sought to file a new application with CTRPA but was unable to do so because it had not obtained the local approval required under CTRPA resolutions.

During the summer of 1982, Brian Stack, S & M's general partner, went to the TRPA office to inquire about the status of his TRPA permit. S & M alleges that Stack was erroneously informed by a staff person that the permit would expire three years from the date of agency approval of the permit application, February 27, 1983 (rather than three years from the date of congressional approval of the 1980 Compact, December 19, 1983), and that there were no provisions for extensions under any circumstances. S & M took no further steps toward commencing construction and on December 18, 1983, its TRPA permit expired by operation of law. According to S & M, had it been aware that its TRPA permit was effective for the 1983 construction season, it would have pursued its efforts to obtain the other requisite authorizations.

In September 1984, S & M wrote to TRPA to request a thirteen-month extension of its TRPA permit. S & M based this request on CTRPA's delay in extending the permit, CTRPA's adoption of resolutions requiring local approval prior to filing a new CTRPA application, and a September 1983 CTRPA moratorium on new project applications. S & M contended that these actions constituted "legal action" under Article VI(p) of the 1980 Compact, which tolls the three-year period for commencing construction when projects authorized by TRPA permits are the

---

begun within that time and diligently pursued thereafter, or the use or activity has commenced. . . .

subject of such actions. TRPA refused to grant the extension, responding that "legal action" as used in the 1980 Compact means litigation, not all actions by governmental agencies. The TRPA governing board denied S & M's subsequent appeal, and S & M filed the instant action. The district court, in granting TRPA's motion for summary judgment, held, as TRPA has urged, that "legal action" as used in the 1980 Compact means litigation. The court also held that the alleged misinformation given by a TRPA staff member did not constitute a sufficient ground to estop the agency from enforcing the regular expiration date of S & M's permit.

II. DISCUSSION

A. *Definition of "Legal Action"*

S & M argues on appeal, as it did below, that CTRPA's adoption of resolutions and moratoria, which allegedly prevented appellant from building its car dealership, constituted "legal action," therefore tolling the period in which it was required to commence construction under its permit. We disagree. The term "legal action" as used in the 1980 Compact can only reasonably be read to mean litigation, not all lawful activities of government agencies, as appellant insists.

After establishing a three-year duration for project approvals, Article VI(p) of the 1980 Compact provides:

> In computing the 3-year period any period of time during which the project is the subject of a legal action which delays or renders impossible the diligent pursuit of that project shall not be counted. Any license, permit or certificate issued by the agency which has an expiration date shall be extended by that period of time during which the project is the subject of such legal action as provided in this subdivision.

When construing a statute, we look first to the plain meaning of the language in question, *Sacramento Regional County Sanitation Dist. v. Reilly*, 905 F.2d 1262, 1268-1269 (9th Cir.1990). If the term at issue has a settled meaning, we must infer that the legislature meant to incorporate the established meaning, unless

the statute dictates otherwise. *See American Tobacco Co. v. Patterson,* 456 U.S. 63, 68, 102 S.Ct. 1534, 1537, 71 L.Ed.2d 748 (1982) ("As in all cases involving statutory construction, . . . we assume 'that the legislative purpose is expressed by the ordinary meaning of the words used.' ") (quoting *Richards v. United States,* 369 U.S. 1, 9, 82 S.Ct. 585, 591, 7 L.Ed.2d 492 (1962)); *Black v. Commissioner of Internal Revenue,* 765 F.2d 862, 864-65 (9th Cir.1985). When the plain language of the statute appears to settle the question, "we look to the legislative history to determine only whether there is 'clearly expressed legislative intention' contrary to that language." *INS v. Cardoza-Fonseca,* 480 U.S. 421, 432 n. 12, 107 S.Ct. 1207, 1213 n. 12, 94 L.Ed.2d 484 (1987) (quoting *United States v. James,* 478 U.S. 597, 606, 106 S.Ct. 3116, 3121, 92 L.Ed.2d 483 (1986), in turn quoting *Consumer Product Safety Comm'n v. GTE Sylvania, Inc.,* 447 U.S. 102, 108, 100 S.Ct. 2051, 2056, 64 L.Ed.2d 766 (1980)).

The plain meaning of the term "legal action" settles the issue before us. *Black's Law Dictionary* (5th ed.1979), while not defining "legal action," defines "action" as:

> Conduct; behavior; something done; the condition of acting; an act or series of acts.
>
> *Term in its usual legal sense means a suit brought in a court; a formal complaint within the jurisdiction of a court of law.* . . . It includes all of the formal proceedings in a court of justice attendant upon the demand of a right made by one person of another in such court, including an adjudication upon the right and its enforcement or denial by the court.

Id. at 26. (citation omitted) (emphasis added). And, in defining the word "litigation," *Black's* actually uses the term "legal action," stating that litigation is:

> A lawsuit. *Legal action,* including all proceedings therein. Contest in a court of law for the purpose of enforcing a right or seeking a remedy . . . .

Id. at 841. Moreover, although apparently few if any courts have ever defined "legal action," literally thousands of cases have used the term to refer to litigation. *See, e.g., Johnson v. Railway*

Express Agency, Inc., 421 U.S. 454, 461, 95 S.Ct. 1716, 1720, 44 L.Ed.2d 295 (1975) ("We recognize, too, that *the filing lawsuit* might tend to deter efforts at conciliation, that lack of success in the *legal action* could weaken the Commission's efforts to induce voluntarly compliance, and that *a suit* is privately oriented and narrow, rather than broad, in application, as successful conciliation tends to be.") (emphasis added); *Boudin v. Thomas*, 732 F.2d 1107, 1114 (2d Cir.1984) ("The drafters perceived *legal actions* as helping to formulate public policy; '*An adjudication or civil action* provides a concrete, adversarial test of Government regulation and thereby insures the legitimacy and fairness of the law.' ") (quoting H.R. Rep. No. 1418, 96th Cong., 1st Sess. 10, *reprinted in* 1980 U.S.Code Cong. & Admin.News 4984 4988-89) (emphasis added); *Local 1498, American Fed'n of Gov't Employees v. American Federation of Government Employees, AFL/CIO*, 522 F.2d 486, 490 (3rd Cir.1975) ("Consequently, however else the activities of government union officers may otherwise be subject to *legal actions*, no cause of action will lie against such officers under the LMRDA as the jurisdictional requirement cannot be met.") (emphasis added). In common usage, the term "legal action" is used to refer to litigation or judicial proceedings. We find nothing in the language or legislative history of the 1980 Compact to suggest that Congress intended differently.[2]

Our conclusion is supported by reference to other provisions of the 1980 Compact in which the term "legal action" appears.

---

[2] Before the fusion of law and equity in the 1938 Federal Rules of Civil Procedure (Rule 2), the term "legal action" was used to refer to an "action at law," as opposed to a "suit in equity." *Ballentine's Legal Dictionary* (3d ed. 1969), for instance, still defines "legal action" as "[a]n action at law" and then defines an "action at law" as:

> An action prosecuted in a law court, as distinguished from a suit in equity. An action, the purpose of which is the recovery of a sum of money or damages, or an action wherein the only relief obtainable or appropriate is a money judgment for damages.

Id. at 19. However, with the elimination of the distinction between courts of law and courts of equity and the adoption of the rule establishing one form of action, Fed.R.Civ.P. 2, the term has come to refer to all judicial proceedings.

When the same word or phrase is used in different parts of a statute, we presume that the word or phrase has the same meaning throughout. *Firestone v. Howerton*, 671 F.2d 317, 320 n. 6 (9th Cir. 1982). The term "legal action" is used consistently in the 1980 Compact to refer to litigation. Article VI(j) of the Compact, for instance, states:

> (j) *Legal actions* arising out of or alleging a violation of the provisions of this compact, of the regional plan or of an ordinance or regulation of the agency or of a permit or a condition of a permit issued by the agency are governed by the following provisions:
>
> (1) This subdivision applies to:
>
> (A) Actions arising out of activities directly undertaken by the agency.
>
> (B) Actions arising out of the issuance to a person of a lease, permit, license or other entitlement for use by the agency.
>
> (C) Actions arising out of any other act or failure to act by any person or public agency.
>
> Such *legal actions* may be filed and the provisions of this subdivision apply equally *in the appropriate courts* of California and Nevada and of the United States.
>
> . . . .
>
> (4) A *legal action* arising out of the adoption or amendment of the regional plan or of any ordinance or regulation of the agency, or out of the granting or denial of any permit, shall be commenced within 60 days after final action by the agency. All other *legal actions* shall be commenced within 65 days after discovery of the cause of action.
>
> (5) In any *legal action* filed pursuant to this subdivision which challenges an adjudicatory act or decision of the agency to approve or disapprove a project, the scope of *judicial inquiry* shall extend only to whether there was prejudicial abuse of discretion. . . . In any *legal action* filed pursuant to this subdivision which challenges a legislative act or decision of the agency (such as the adoption of the regional plan and the enactment of implementing ordi-

> nances), the scope of the *judicial inquiry* shall extend only to the questions of whether the act or decision has been arbitrary, capricious or lacking substantial evidentiary support or whether the agency has failed to proceed in a manner required by law.

(emphasis added).

There can be no question that the term "legal action" is used in the article to refer to litigation. The article explains that legal actions can arise out of certain acts by the agency and can be filed in either state or federal court, it sets a limitations period for the commencement of such lawsuits, and it defines the scope of judicial inquiry governing various types of legal challenges. Interpreting the term "legal action" to mean any lawful action taken by a governmental agency, as appellant requests, would render Article VI(j) nonsensical. Resolutions, moratoria, and other activities of government agencies are not filed in courts and they do not involve any judicial inquiry. Moreover, it would be odd for a "legal action," as used in Article VI(j), to arise out of the very activities that appellant urges us to call "legal action." Because under that article "legal actions" *arise out of* agency actions such as the adoption or application of regulations or moratoria, "legal actions" cannot logically *consist of* such agency actions. We therefore reject appellant's construction of the term. Since S & M's project was not the subject of a "legal action" as that term is used in the 1980 Compact, TRPA and the district court correctly concluded that appellant's permit had expired.

B. *Equitable Estoppel*

S & M argues that TRPA should be estopped from contending that the company's TRPA permit had expired in December 1983 because a TRPA staff member gave Brian Stack, the company's general partner, erroneous information during the summer of 1982. The agency staff member allegedly told Stack that S & M's permit expired in February 1983 rather than December 1983, and stated that there was no possibility of obtaining an extension.[3]

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[3] For the purposes of its summary judgment motion, TRPA admitted S & M's allegations concerning the misinformation given to Stack.

A party seeking to invoke estoppel against the government must satisfy two requirements in addition to those ordinarily applicable. *Watkins v. United States Army,* 875 F.2d 699, 707 (9th Cir. 1989) (*en banc*), *petition for cert. filed,* ____ U.S. ____, ____ S.Ct. ____, ____ L.Ed.2d ____ 58 U.S.L.W. 3771 (U.S. May 21, 1990) (No. 89-1806).[4] First, it must establish "affirmative conduct going beyond mere negligence." *Id.* (quoting *Wagner v. Director, Fed. Emergency Management Agency,* 847 F.2d 515, 519 (9th cir.1988)). Second, it must show that the government's act will cause a serious injustice and imposition of estoppel will not unduly harm the public interest. *Id.*

Appellant cannot meet even the first of these requirements. The conduct at issue involves one oral misstatement by a low-level government employee.[5] In dealing with the government, an individual is charged with knowing government statutes and regulations and assumes the risk "that government agents may exceed their authority and provide misinformation." *Lavin v. Marsh,* 644 F.2d 1378, 1383 (9th Cir.1981); *see also Wagner,* 847 F.2d at 519 ("there is always a risk that misinformed agency employees may err in interpreting statutes and regulations"). In *Watkins v. United States Army,* 875 F.2d at 708, we distinguished an isolated act of providing misinformation from "ongoing active misrepresentations" or a "pervasive pattern of false promises," holding that only the more egregious conduct amounts to affirmative misconduct justifying estoppel against the government. Moreover, "[t]he fact that the incorrect information is given

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[4] "Traditional estoppel requires the following '(1) The party to be estopped must know the facts; (2) he must intend that his conduct shall be acted on or must so act that the party asserting the estoppel has a right to believe it is so intended; (3) the latter must be ignorant of the true facts; and (4) he must rely on the former's conduct to his injury,' " *Watkins,* 875 F.2d at 709 (quoting *United States v. Wharton,* 514 F.2d 406, 412 (9th Cir.1975)).

[5] S & M also points to a letter sent by TRPA in February of 1984 erroneously confirming that S & M's permit expired in February 1983 (rather than December 1983). As this letter was sent *after* the permit had already expired, it cannot be used to estop TRPA from enforcing the regular December 1983 expiration date.

orally makes it even less likely to rise to the level of affirmative misconduct." *Rider v. United States Postal Serv.*, 862 F.2d 239, 241 (9th Cir.1988), *cert. denied*, ____ U.S. ____, 109 S.Ct. 2430, 104 L.Ed.2d 987 (1989).

Thus, a single oral misstatement by a government employee will not constitute affirmative misconduct. In *Schweiker v. Hansen*, 450 U.S. 101 S.Ct. 1468, 67 L.Ed.2d 685 (1981), for instance, the Supreme Court held that there was no affirmative misconduct when a field representative of the Social Security Administration, in response to an inquiry, erroneously informed a claimant that she was not eligible for benefits, causing her to leave the agency's office without filling out an application. Similarly, in *Mulcherjee v. INS*, 793 F.2d 1006, 1009 (9th Cir.1986), we held that an incorrect statement by an American vice-consul to an alien that he was not subject to the two-year foreign residency requirement did not reach the level of affirmative misconduct required for estoppel against the INS. Given this standard, the isolated misstatement by a TRPA employee to Brian Stack cannot be held to amount to affirmative misconduct estopping TRPA from enforcing the normal expiration date of S & M's permit.

Accordingly, we hold that the district court was correct in granting TRPA's motion for summary judgment.[6]

AFFIRMED.

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[6] S & M also argues that there are two genuine issues of material fact precluding summary judgment. Its argument is without merit. First, S & M contends that the parties disagree whether the CTRPA moratorium was mandated by TRPA. Any such disagreement would be of no relevance here. Even if TRPA could be held responsible for CTRPA's actions, the moratorium does not constitute a "legal action" under Article VI(p), and would thus not toll the expiration of S & M's permit. Second, appellant asserts that whether the TRPA staff person intended S & M to act upon his representation is a material issue of fact. For purposes of summary judgment, TRPA conceded this issue. It is therefore not in dispute. More important, in light of S & M's inability for other reasons to meet the estoppel requirements, the undisputed fact cannot serve to preclude summary judgment.

APPENDIX B

ORDER OF UNITED STATES DISTRICT COURT EASTERN DISTRICT OF CALIFORNIA

IN THE UNITED STATES DISTRICT COURT
FOR THE
EASTERN DISTRICT OF CALIFORNIA

CIV. No. S-86-1215 EJG

S & M INVESTMENT CO.,
a California general partnership,
Plaintiff,

v.

TAHOE REGIONAL PLANNING AGENCY, et al.,
Defendants.

[Filed Dec. 12, 1988]

ORDER GRANTING PARTIAL SUMMARY JUDGMENT

This matter is before the court on defendant Tahoe Regional Planning Agency ("TRPA")'s motion for partial summary judgment on counts 1, 2 and 3 of plaintiff's complaint. Following oral argument, the court took the matter under submission, and upon further review of the briefs and authorities cited therein, the court now grants defendant's motion for the reasons stated below.[1]

This action was originally filed in El Dorado County Superior Court and removed to this court based on federal question jurisdiction. The first two causes of action are pleaded in terms of state law claims for administrative mandamus and for a writ of mandate under the California Code of Civil Procedure. The third cause of action seeks declaratory relief. Only these first three claims of the complaint are the subject of this motion. All three claims seek review of TRPA's final determination that a develop-

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[1] The court has also considered plaintiff's post hearing citations to *Herrington v. Sonoma Co.*, 834 F.2d 1488 (9th Cir. 1987), and *Baranick v. Co. of Marin*, F.2d (9th Cir. No. 87-1982) (Slip Op. filed June 30, 1988), both of which are inapposite to this motion.

ment permit it had issued to plaintiff for the construction of an automobile dealership in the Tahoe Basin had expired. Judicial review of such a decision is provided for in Article VI(j) of the bi-state Tahoe Regional Planning Compact ("Compact"). Although counts one and two of the complaint are predicated under the California Code of Civil Procedure, the court entertained and granted plaintiff's oral motion to amend those counts so as to seek review of TRPA's decision pursuant to Article VI(j) of the Compact. Under Article VI(j), this court's review is limited to determining whether TRPA's decision was supported by substantial evidence and is otherwise in accordance with the law.

As to the defendant's motion for summary judgment on the first three causes of action, the court finds that there are no genuine disputes as to any issues of material fact. Rather the motion turns purely on questions of law; i.e., whether the defendant agency correctly construed the terms "Legal Action" in Article VI(p) of the Compact, and whether as a matter of law, equitable estoppel may be asserted against the defendant based on the facts alleged by plaintiff.

The record shows that the building permit here in question expired by operation of law on December 19, 1983, unless the expiration date was tolled under Article VI(p). That article provides for the tolling of any "period of time during which the project is the subject of legal action." Compact, Article VI(p). Plaintiff contends that the term "legal action" means anything which prevented the start of construction and which was not illegal. Thus, plaintiff concludes that any delay due to any act or event which is not illegal would come within the tolling provision of Article VI(p). Using that broad definition, plaintiff claims that certain non-litigation actions by other agencies coupled with earlier non-litigation acts by TRPA prevented the start of construction. Plaintiff further asserts that these non-litigation actions were not illegal and therefore fall within the terms "legal action" as used in Article VI(p). The defendant agency on the other hand has given the terms a narrower interpretation. It interprets the phrase "subject of legal action" to mean a lawsuit or litigation which delays the start of construction.

Clearly, defendants' interpretation is the correct one. It is more logical, and gives meaning to the plain language of Article VI(p) which the court does not find ambiguous. Even assuming an ambiguity, the court adopts the reasoning in *Sederquist v. TRPA*, 652 F.Supp. 341, 345-46 (D.Nev. 1987). As explained therein, the interpretation of a statute by the agency charged with its administration is entitled to deference. Thus, if the phrase were considered ambiguous, defendant's interpretation controls because it is a reasonable and sensible interpretation of the language. In contrast, plaintiff's suggested construction of Article VI(p) borders on the frivolous. Obviously, the phrase "subject of legal action" is a reference to a lawsuit or formal litigation that prevents commencement of construction and is not, as plaintiff contends, a broad, open-ended tolling provision for any act or event that does not happen to be illegal. The latter construction not only tortures the language of the statute but defies common sense.

Plaintiff also argues that there is no clear TRPA policy regarding the meaning of the terms "legal action". Therefore, argues plaintiff, there is no reason to defer to the agency's interpretation. However, plaintiff is simply mistaken. Plaintiff put the issue of the interpretation of Article VI(p) before the TRPA governing board when it sought a permit extension based on the same arguments plaintiff asserts now. Plaintiff lost when the motion before the board to approve the requested extension failed. That decision necessarily involved the agency's interpretation of the disputed term, and as noted above, that interpretation is entitled to deference.

Plaintiff has also attempted to manufacture a disputed issue of fact to defeat summary judgment by linking the separate actions by the California-TRPA ("C-TRPA"), the city and the county, with acts by TRPA. Defendant has pointed out that it was the acts of the former and not TRPA which delayed the project start up after TRPA issued a permit. Moreover, the actions of those agencies may not be attributed to TRPA. Plaintiff has responded that the question of which agency caused the delay is a factual dispute that precludes summary judgment. Assuming the genuineness of such a dispute, it is immaterial. As noted above, the

delay was not the result of legal action, and it simply does not matter which agency, if any, was responsible for plaintiff's frustrations. Moreover, what plaintiff really complains of is having been frustrated by other independent agencies after TRPA had already issued the permit. TRPA gave its final discretionary approval in February 1980. The delays occasioned thereafter by the acts or decisions of other independent agencies such as the C-TRPA were not the result of action by the defendant. C-TRPA and TRPA were not in privity and each was independent of the other. *See People, etc. v. City of So. Lake Tahoe*, 466 F.Supp. 527, 532, n.7 (E.D. Cal. 1978). Plaintiff's attempt to manufacture a disputed question of fact by arguing that C-TRPA's action in delaying the start of the project was "TRPA inspired" is specious. The statutory make up of the two agencies clearly demonstrates their independence from each other. *Id.*

Plaintiff obtained TRPA's permit approval on February 27, 1980. That permit was good for one year. Eventually, its validity was extended to three years from the December 19, 1980 extension date. Any impediments to plaintiff pursuing the project were not the result of TRPA. Plaintiff's argument that TRPA caused C-TRPA's action by mandating Article VI(c) of the new Compact also misses the mark. (Plaintiff's opposition, p.21, l.14). Congress and the two compacting states, not TRPA enacted the Compact and its Article VI(c). Indeed, TRPA is a creation of the Compact. C-TRPA was created by California alone. The specific delays plaintiff complains of here occurred after TRPA issued its approval and involved plaintiff's inability to get other approvals from C-TRPA, the city and the county. Moreover, none of the acts or events which plaintiff says delayed the project start up fall within the tolling provision of Article VI(p).

Plaintiff also alleges that TRPA should be estopped from asserting that plaintiff's permit has expired because of alleged misinformation given to plaintiff by defendant's employees. Those employees allegedly told plaintiff that including the three year extension, the permit would expire three years from the date of its

approval.[2] It is further alleged that defendant's employees mistakenly told plaintiff that there was no way to get a further extension of the expiration date. Defendant does not dispute those allegations for the purposes of this motion. However, this estoppel claim fails as a matter of law.

As with the previous issue regarding agency interpretation, Judge Reed's opinion in *Sederquist* regarding estoppel is similarly instructive on this issue. To successfully assert estoppel against a governmental agency, plaintiff must not only show the traditional elements, but must also show affirmative misconduct that goes beyond mere negligence. Even then, affirmative misconduct will not estop the government unless the wrongful conduct threatens to work a serious injustice and the public's interest would be unduly damaged by the imposition of estoppel. *Sederquist, supra.*

Here, plaintiff fails to meet even the traditional test, i.e., that defendant knew the true facts, that defendant intended that its misrepresentations be acted upon (or that defendant acted in such a way that plaintiff was led to believe defendant so intended), that plaintiff was ignorant of the true facts, and that plaintiff relied on the misrepresentations to his detriment. *See Sederquist, supra.* Plaintiff has not shown that its inability to commence the project prior to the expiration of the permit in December 1983 is attributable to the misinformation allegedly given by TRPA's staff members. Moreover, plaintiff is presumed to know the law. Article VI(p) is clear to even a lay person that extensions can be obtained under limited circumstances. Thus, assuming the facts as alleged by plaintiff, the equitable estoppel claim against this governmental agency fails as a matter of law.

For the above reasons, defendant's motion for summary judgment as to the first three causes of action is granted.

---

[2] The three year extension actually ran from the date the extension was granted which was December 19, 1980. Thus, the permit did not actually expire until December 19, 1983.

A status conference is set for February 3, 1989 at 10:30 a.m. Counsel shall file status conference reports by January 23, 1989 which shall address scheduling of the balance of this case. *See* Local Rule 240.

IT IS SO ORDERED.

DATED: December 7, 1988.

EDWARD J. GARCIA
Edward J. Garcia, Judge
United States District Court

APPENDIX C

ORDER ON PETITION FOR REHEARING

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 89-15353
CIVS-86-1215-EJG/EM

S & M Investment Co.,
a California general partnership,
Appellant,

v.

Tahoe Regional Planning Agency,
a public entity, Does I through XXX, inclusive,
Appellees.

[Filed Sep. 14, 1990]

ORDER

Before: LIVELY,* FLETCHER, and REINHARDT, Circuit Judges

Appellant's petition for rehearing is denied.

---

* The Honorable Pierce Lively, Senior Circuit Judge of the Sixth Circuit, sitting by designation.

APPENDIX D

JUDGMENT OF DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE
EASTERN DISTRICT OF CALIFORNIA

CIV NO. S-86-1215 EJG

S & M Investment Co.,
a California general partnership,
Plaintiff,

v.

Tahoe Regional Planning Agency, et al.,
Defendants.

[Filed Feb. 13, 1989]

JUDGMENT

On December 7, 1988, the Court granted the motion of defendant, TAHOE REGIONAL PLANNING AGENCY for partial summary judgment on counts 1, 2, and 3 of plaintiff's complaint. By stipulation of the parties made pursuant to FRCP 41(a)(1), counts 4 and 5 of plaintiff's complaint were voluntarily dismissed.

There being no further issues to be decided in this matter, IT IS ORDERED AND ADJUDGED,

That the plaintiff take nothing, that this action be dismissed on the merits, and that each party be responsible for their own costs and attorneys' fees.

Dated at Sacramento, California, this 10th day of Feb., 1989.

EDWARD J. GARCIA
United States District Judge

APPROVED AS TO FORM:

GREGG R. LIEN
Gregg R. Lien, attorney
for plaintiff

APPROVED AS TO FORM:

SUSAN SCHOLLEY
Susan Scholley, attorney
for defendant

APPENDIX E

TAHOE REGIONAL PLANNING AGENCY
RESOLUTION 90-8

RESOLUTION DEFINING THE PROCEDURE FOR DEALING WITH QUESTIONS OF WHAT CONSTITUTES LEGAL ACTION

WHEREAS, the Tahoe Regional Planning Compact, Article VI(p) provides that the time period a project is subject to legal action which delays or renders impossible the diligent pursuit of a project shall not be counted in computing the three-year time period; and

WHEREAS, determination needs to be made as to what constitutes such "legal action".

NOW, THEREFORE, BE IT RESOLVED that the Governing Board of the Tahoe Regional Planning Agency authorizes the Executive Director, after consultation with Agency Counsel, to review and make determinations that a project is the subject of legal action which delayed or rendered impossible its diligent pursuit as a result of the filing of a court action for quiet title, breach of purchase and sale agreement, eminent domain proceeding, and any court order affecting the project. Any other application for extension pursuant to Article VI(p) of the Compact where the definition of legal action is at issue shall be submitted to the Legal Committee for recommendation and then to the Governing Board for final determination. In making this determination the Governing Board shall consider the cause of the legal action and the degree of control over the legal action by the permittee.

PASSED AND ADOPTED by the Governing Board of the Tahoe Regional Planning Agency at its regular meeting held on March 28, 1990 by the following vote:

Ayes: Ms. Del Papa, Mr. Fluty, Mr. Houghteling, Mr. DeLanoy, Mr. Bradford, Mr. Chimarusti, Mr. Gibbs, Mr. Cefalu, Mr. Kanoff, Mr. Klein, Mr. Westergard

Nays: None

Abstain: None

Absent: Ms. Cornwall, Mr. Cronk, Ms. Bennett

ROLAND D. WESTERGARD
Roland D. Westergard, Chairman
Tahoe Regional Planning Agency

Supreme Court, U.S.
FILED
JAN 18 1991
JOSEPH F. SPANIOL, JR.
CLERK

(2)

No. 90-946

In The

Supreme Court of the United States

October Term, 1990

S & M INVESTMENT CO.,
a California general partnership,

Petitioner,

vs.

TAHOE REGIONAL PLANNING AGENCY,
a public entity, DOES I through XXX, inclusive,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION

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QUESTIONS FOR REVIEW

1. Did the district and appellate courts correctly interpret the phrase "legal action" as used in Article VI(p) of the Tahoe Regional Planning Compact?

2. Did the district and appellate courts correctly conclude that erroneous oral advice by a Tahoe Regional Planning Agency ("TRPA") employee did not estop TRPA from enforcing Article VI(p) of the Tahoe Regional Planning Compact?

3. Did the district and appellate courts correctly conclude that no genuine issues of material fact existed?

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BRIEF IN OPPOSITION

The Tahoe Regional Planning Agency, Respondent, submits this brief in opposition to the petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit that was filed on December 12, 1990, by S&M Investment Company, Petitioner.

STATUTE INVOLVED

This case involves Article VI(p) of the amended Tahoe Regional Planning Compact (Public Law 96-551, 94 Stat. 3233, 3248, December 19, 1980) which provides as follows:

> (p) Approval by the agency of any project expires 3 years after the date of final action by the agency or the effective date of the amendments of this compact, whichever is later, unless construction is begun within that time and diligently pursued thereafter, or the use or activity has commenced. In computing the 3-year period any period of time during which the project is the subject of a legal action which delays or renders impossible the diligent pursuit of that project shall not be counted. Any license, permit or certificate issued by the agency which has an expiration date shall be extended by that period of time during which the project is the subject of such legal action as provided in this subdivision.

STATEMENT OF THE CASE

This case involves the interpretation and enforcement of the Tahoe Regional Planning Compact, an interstate compact between the States of California and Nevada. The Tahoe Regional Planning Compact (P.L. 91-148, 83 Stat. 860, December 19, 1969; Nevada Revised Statutes 277.200; California Government Code Section 66801) ("Compact"), created a bi-state agency, the Tahoe Regional Planning Agency ("TRPA"), to prepare and implement a regional plan for the Lake Tahoe Basin. Lake Tahoe is an alpine lake that straddles the California-Nevada state line. The Tahoe Region has a land area of 324 square miles and an approximate population of 48,000.

The facts of the case are set forth in detail in the Memorandum of Points and Authorities Supporting Defendant Tahoe Regional Planning Agency's Motion for Partial Summary Judgment, pp. 4-7, and are excerpted below for the reader's convenience.

On February 27, 1980 TRPA gave Petitioner, S&M Investment Company ("SMIC"), an 18-month approval to construct an automobile dealership. SMIC also had received a one-year approval, on February 1, 1980, from the California Tahoe Regional Planning Agency ("C-TRPA"), an independent state agency operating pursuant to California Government Code Section 67131.

For reasons of its own, SMIC chose not to start the project in 1980 and instead sought an extension of its C-TRPA approval. In the interim the Tahoe Regional Planning Compact had been amended (P.L. 96-551, 94 Stat. 3233, Dec. 19, 1980) and, pursuant to Article VI(p) of the

amended Compact, SMIC's TRPA approval was automatically extended to December 19, 1983.

C-TRPA delayed action on SMIC's extension request based on a C-TRPA resolution. A one-year extension was ultimately granted on August 7, 1981. Again, for business reasons, SMIC chose not to start construction in 1981 or in 1982. On August 7, 1982 the C-TRPA approval expired.

SMIC allegedly inquired in mid-1982 at TRPA's counter as to the TRPA expiration date for the project. SMIC contends that it was told TRPA approvals were valid for three years and could not be extended under any circumstances. Based on this information, SMIC did not pursue a new C-TRPA approval in 1983 and its TRPA approval expired, by operation of law, on December 19, 1983. TRPA conceded these allegations for purposes of its summary judgment motion in district court.

In 1984 SMIC wrote to TRPA and requested an extension of its 1980 project approval based on Article VI(p) of the amended Compact which provides, in relevant part, that:

> "(p) . . . In computing the three year period [of approval] any period of time during which the project is the subject of a legal action which delays or renders impossible the diligent pursuit of the project shall not be counted. . . . "

SMIC argued that various C-TRPA regulations constituted legal actions which delayed the project and that SMIC's project was therefore entitled to an extension of its TRPA approval. SMIC further claimed it had been misled to its detriment as to the correct expiration date of its TRPA approval.

SMIC proceeded through TRPA's appeal process and its appeal was denied by the TRPA Governing Board on March 26, 1986. SMIC then filed suit in state court. TRPA removed the action to the U.S. District Court, Eastern District of California. TRPA filed a motion for summary judgment on the counts relating to the statutory interpretation of Article VI(p) of the amended Compact and estoppel against TRPA.

The District Court, Judge Edward J. Garcia presiding, granted TRPA's motion for summary judgment finding that the term "legal action" was unambiguous and referred to litigation, and that erroneous oral advice which contradicted the clear provisions of the amended Compact did not estop TRPA from enforcing the December 19, 1983 expiration of SMIC's project approval.

SMIC filed an appeal with the Ninth Circuit Court of Appeals. The Ninth Circuit affirmed the district court decision on both issues (statutory interpretation and estoppel) and denied SMIC's request for rehearing.

During the pendency of the Ninth Circuit appeal, the TRPA Governing Board adopted Resolution 90-8 (Petition, Appendix E) which provided for staff review of certain requests for project extensions under Article VI(p) and required the remainder of such requests to be decided by the TRPA Governing Board. The resolution is procedural and does not define legal action.

SMIC asked the Ninth Circuit to augment the record on appeal to include TRPA Resolution 90-8. During appellate oral argument SMIC claimed the resolution was relevant but the Ninth Circuit denied SMIC's motion to augment the record.

SMIC's statement of the case claims that their property is restricted from further development by TRPA and that the loss of the automobile dealership approval reduced the fair market value of the property by $500,000. Petition, p. 3. These allegations were not part of the district court or appellate court record. TRPA's plan does *not* prohibit further development of SMIC's property. Finally, the inverse condemnation claims in the complaint were voluntarily dismissed by SMIC and not appealed.

REASONS FOR DENYING WRIT

SUMMARY

The petition does not raise important issues of federal law, issues of public importance, conflicts between the circuits, or federal and state courts, or departures from established precedents. The issues raised involve (1) the interpretation of one term in an interstate compact that affects a small geographical area and (2) the review of an estoppel claim with a unique factual situation. Both lower courts arrived at the same conclusions based on established precedent, including U.S. Supreme Court decisions.

1. The Issues Raised by the Petition Are Not Special Or Important.

Supreme Court Rule 10.1 sets forth the character of reasons for granting certiorari. The petition does not raise any of the enumerated reasons.

The importance of the issues raised is judged in relation to the public, not to the individual involved. *Rice v. Sioux City Cemetery*, 349 U.S. 70, 79 (1955). Since the Tahoe Regional Planning Compact is a one-of-a-kind statute and has no application outside the Lake Tahoe Basin, its interpretation is of interest only to a limited number of developers and governments in the Tahoe Region. None of the issues presented for review have national or even statewide importance. Finally, C-TRPA was deactivated by California in 1984 and thus SMIC's factual situation is unique and cannot be repeated.

2. The District Court And Appellate Decisions Were Based On Established Precedent.

With respect to the statutory interpretation of Article VI(p) of the amended Compact, both lower courts agreed that "legal action" had an unambiguous meaning. Their analyses were based on longstanding rules of statutory, construction accepted by the Supreme Court. Petition, p.A-5. Since courts are the final determiner of statutory interpretation, TRPA Resolution 90-8 cannot, and was not intended to, change the judicial interpretations.

With respect to the estoppel argument, again, both lower courts agreed that the facts, as a matter of law, did not support the imposition of estoppel against TRPA. Both lower courts based their decisions on a long line of Ninth Circuit cases, and the Supreme Court decision in *Schweiker v. Hansen*, 450 U.S. 785, 788-790 (1981).

3. The Petition Attempts to Relitigate Factual Issues Which Do Not Warrant Further Review

Both lower courts agreed with TRPA that the material facts relating to SMIC's estoppel claim were not in dispute. Petitioner continues to argue that summary judgment was inappropriate because material facts were in dispute. SMIC desires to relitigate the lower courts' findings with respect to the materiality of the facts and the existence of a dispute. However, it is not the facts that SMIC disagrees with; it is the courts' legal interpretation of those facts.

In any event, a petition raising only issues of fact and materiality is not appropriate for review unless other important questions are raised. *United States v. Johnston*, 268 U.S. 220, 227 (1925).

CONCLUSION

For these reasons, the petition for writ of certiorari should be denied.

Respectfully Submitted.

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